Supreme Court, U. S.
FILED
JUN 5 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-1531

RICHARD PERRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

The petitioner, Richard Perry, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on March 28, 1975, affirming a judgment of the United States District Court for the Southern District of New York convicting him of influencing the outcome of harness races by bribery and of conspiring to do so in violation of Title 18, U.S.C. Section 224. Reargument was denied on May 7, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 28, 1975 and is set forth in the Appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

No extension of time within which to file the instant petition has been sought.

QUESTIONS PRESENTED

1. Whether due process requires that a hearing be held to determine the competency of a key government witness whose mental state had been seriously challenged by the defense?

2. Whether the deliberate elicitation by the prosecution of evidence that petitioner Perry was associated with the mob destroyed any possibility of his receiving a fair trial as mandated by the Due Process Clause of the Federal Constitution?

3. Whether the testimony of a mathematician whose sole purpose was to establish the possibilities or the probabilities that the defendants committed the crimes charged undermines the

principal that a defendant's guilt must be established beyond a reasonable doubt?

4. Whether as a prophylactic measure, this Court should grant certiorari in order to determine whether the lawless conduct of the Government is so offensive to the administration of justice that an acquittal should have been ordered as a matter of due process?

STATEMENT OF THE CASE

This case not only reflects the unique issues which were involved in this appeal but also stretches the standards of a defendant's due process right to a fair trial to its breaking point. Accordingly, the devastating impact of the Second Circuit's decision on a defendant's right to a fair trial mandates that this Court grant certiorari in this case.

Petitioner Perry and 28 co-defendants (harness racing drivers and gamblers) were charged in a two count indictment with wilfully carrying into effect and attempting to carry into effect a scheme in commerce to influence by bribery sporting contests, to wit, the outcome of harness races at Yonkers and Roosevelt Raceways in violation of Title 18, U.S.C. Sections 224, 2. The defendants were also charged with conspiring to do the same. Only petitioner Perry and the defendant Gerry were convicted of the aforementioned charges.

It is conceded that the Government established that petitioner Perry was a gambler with money to invest and that the defendant Gerry would relay his racing selections to various

people including the petitioner who would then bet large sums of money at different OTB parlors throughout the city. If their wagers were successful, other individuals would then be given the responsibility of cashing the tickets, admittedly to avoid the payment of taxes. It is petitioner Perry's position that he had no knowledge of any bribery scheme since neither the conduct of the races nor the fact alone that he used Gerry's racing selections proved that he knowingly participated in any bribery scheme.

In order to prove their case against petitioner and the other defendants, the Government first presented three witnesses who attempted to establish that the betting patterns reflected in the OTB printouts could give rise to the inference that the races were fixed.[1]

First, Michael Shagan, Vice President of OTB, described the initiation of the investigation into what he thought to be unusual betting patterns of the Superfecta races. The Superfecta was an exotic race wherein the bettor had to select various combinations of horses in order to win his wager (523-524).[2] According to Shagan, a review of the 1099 tax forms showed that certain individuals were cashing more than one Superfecta ticket at a time which often had a payoff of $200 or $300 per ticket (572). Shagan thought this highly unusual compared to the normal situation at OTB where it was rare for one teller to cash more than one or two exotic winning tickets. From the 1099 forms, he went on to identify groups of people who had cashed multiple winning Superfecta tickets amounting to one

1. OTB is the Off Track Betting Corporation set up in New York where people can place bets on races at various parlors without going to the track.

2. Numerical references are to the pages of the trial transcript.

and a quarter million dollars (572). He was also able to determine that a relationship existed between the purchasers and the cashers of the tickets as the tickets that had been cashed had been purchased a few minutes apart at the same window (573).

Next, Shagan investigated the betting patterns reflected in a series of transactions (576). He established a general pattern among the unusual bets of leaving out certain horses and keying in one or two horses. Shagan admitted telling the Grand Jury "whether it is great handicapping or fixing, it is not something we can tell from our records" (920-921).

Agent Nicholas Gianturco prepared charts for the Government with each chart representing a selected day of Superfecta activity, information regarding where the tickets were purchased, and the betting parameter (which horses were omitted and which were keyed in) (697). His charts revealed that over a 40 day period there were 22 winning days and 18 losing days (1677). The charts did not reflect how many of the longest horses in the races were left out during this 40 day period nor did it indicate the betting pattern for the rest of the city (697). Furthermore, the charts did not indicate the betting odds for a particular horse run in the Superfecta; it did not reflect the winning tickets at either Roosevelt or Yonkers Raceway; it did not include the weather conditions on the chosen days, the racing history of the horse, the positions the horses drew for the race, or the condition of the tracks (738-739, 748-749, 755). Agent Gianturco admitted that the charts showed the Government's theory of the case and not the entire factual situation (748). An examination of these charts demonstrates that it is virtually impossible to determine how the Government

decided that a particular racing result warranted charging a particular defendant with bribery.

The Government then produced its statistical expert, Dr. Arthur Yaspan who conducted a study of Superfecta races in 1972. Counsel objected to his testimony claiming that the defendants' guilt cannot be based on probabilities, possibilities, or the question of chance (6109-6110). Counsel also argued that the testimony was irrelevant as the defendants were charged with fixing races in 1973 and not 1972. The court ruled that both the testimony of the statistician and his prepared charts would be admissible (6156).

Dr. Arthur Yaspan was contacted by the Government and agreed to do a study leaving out the two longest horses in an eight horse race in 1972. By analyzing 72 races, he ascertained which were the two weakest horses as measured by the final odds at post time (6166-6167). By using this system, he determined that if he had bet $1,080 and used each of the six horses left, he would have incurred a 20% loss (6168). He then ascertained the effects of buying 40 tickets for a combination bet and found that he would have sustained a 35.6% loss (6169). He admitted that if he were an OTB bettor and as OTB closed at 6:30 p.m., he could not know for a certainty which horses he thought to be the two weakest horses (6177). Additionally, his study did not take into account post positions of the horse, whether a leading or inexperienced driver was on the horse, the past performances of the horse, or the quality of the competition (6185-6186, 6336). Finally, Dr. Yaspan acknowledged that he was not an expert on racing and even more important, when asked based upon his scientific experiments whether he could beat the races, the witness answered "probably" (6352).

The only witness in this entire 11,000 page record connecting petitioner Perry with knowledge of any bribery attempt was one Bruce Cussell. According to Cussell, commencing in February or March of 1973, petitioner Perry paid him $200 per week to buy OTB Superfecta tickets for him (3571). The defendant Gerry would usually call Perry and he would overhear Gerry giving Perry two dead horses for that night at the trotters and a live horse that would finish first or second (3574). Cussell also maintained that he had heard a conversation between petitioner Perry and the defendant Vario regarding the fixing of horses and how Gerry was in on the scheme (3611).

On cross examination of this witness, his past and present psychiatric history was revealed.

Cussell who was then 28 years of age had first been hospitalized for schizophrenia at the age of 16 (3569). He was presently confined in an institution for the mentally disturbed and had been in a total of four different mental institutions (3700-3701). He was also under the influence of drugs which he took regularly to calm him (3671-3672).

Cussell was unable to recollect many facts regarding his mental condition. He denied having hallucinations or delusions and denied hearing voices telling him they were going to harm him (3669). Finally, after intensive questioning, Cussell admitted that he imagined that people were talking to him and that this would occur about once a month (3693). Cussell then attempted to qualify his answer by stating that he heard such voices only once every two years and ultimately, he denied

having any hallucinations in the past six years (3695). After having his recollection refreshed, Cussell admitted that he might have had hallucinations in the last year when he admitted to the hospital that he was hearing voices telling him to kill himself (3700). Cussell, however, could not remember telling the doctor upon his admission to Payne Whitney Psychiatric Clinic in March of 1967 that he was seeing and hearing things. He did not remember telling a doctor in 1968 that he was "seeing people in different forms" (3743). The witness attempted to explain that it was hard for him to remember these things but he insisted that he could remember the events relating to the race fixing. He stated that he could remember what had occurred last year but could not remember what occurred a while ago (3745). However, Cussell still could not remember telling a doctor upon his admission to the hospital in June of 1973 that he was "freaked out, disoriented, and confused" (3746). He could not remember telling a doctor upon his readmission to Brooklyn State Hospital on June 27, 1973 that he was suffering from auditory hallucinations (3750). Furthermore, he could not remember telling a psychiatric social worker in July of 1973 that he had god-like powers over other people and that he was very hostile to people (3735). He also could not recall saying "insanity is Utopia." Even when readmitted to Brooklyn State Hospital four months ago, Cussell could not remember running nude around his home last year which prompted his parents to admit him to Brooklyn State Hospital (3674). He denied setting his hair on fire and claimed that he merely put a match to it and blew it out in front of an orderly (3702). He did admit that one and a half years ago, he had threatened to destroy himself by jumping out of a window while confined in the hospital but he was stopped again by an orderly (3670).

According to this witness, in April of 1972, he was admitted to a hospital for several months and on December 22, 1973 was again admitted to a hospital where he spent the next three months. He insisted that he was well during January through March of 1973 (3678, 3681).

Cussell admitted that when questioned before the Grand Jury, he responded only by stating yes or no to questions put to him by Mr. Meyerson (3691). Before testifying in the present case, he met with the government prosecutors for seven consecutive days, spending one and a half to two hours each day with them. He was then returned to Washington for the weekend and again on Monday met with the Government to discuss his testimony. When counsel asked "Would you agree with me that they were drumming it into your head, all of the same reports, the same grand jury testimony, same statements," Cussell responded, "yes" (3814). Cussell considered himself an important witness in this case (3691).

Counsel thereupon moved to disqualify this witness on the ground of mental incompetency, pointing out again that he could not remember recent events and that his testimony was full of contradictions (3766). The Government responded that the letters from St. Elizabeth Hospital where Cussell was presently confined showed that this man could testify from memory without impairment due to psychiatric problems (3766). The court refused to adjudicate Cussell insane (3781). At a subsequent point in the trial, counsel pointed out that the letters stating that Cussell was competent were sent without notice to the defendants (4030). The court construed this as a request to cross examine the doctors to which counsel agreed (4031). The

court, however, stated that the defense should bring doctors in to testify on their case. When counsel questioned why the burden was on them, the court responded that they were attacking the Government witness (4031).

Prejudicial Mob References

David Kraft, a Government witness, who allegedly was induced into the scheme by one Joseph Pullman was questioned by the defense as to whether he thought that defendant Gerry was actually fixing the races or whether he had been a victim of a tout scheme. He specifically stated on cross examination that because he had been losing money, he had to borrow money and admitted testifying before the Grand Jury "I went to my own bank to borrow money before I knew I was involved in a sucker's game" (4420). When asked again if he were a victim of a "tout scheme," the witness responded, "I was a victim of something" (4650).

The Government then informed the court that he had spoken to the witness after he had testified on Friday and asked why he did not think it was a tout scheme. The witness had responded that Pullman told him that Gerry was providing information to a man named Richie who was related to the mob and you don't tout the mob. The Government conceded that this offer of proof was "highly prejudicial and yet highly probative" (4667, 4744, 4740). When the Government then stated that it would try to frame its questions to minimize the prejudicial effects of such testimony, the court stated it would receive the statement (4825).

On redirect, Kraft testified that after complaining to Pullman about the money he was betting in comparison to the small returns, Pullman told him that Gerry was betting huge amounts of money with other people throughout the five boroughs of New York, especially someone by the name of Richie Perry (petitioner) who was betting tremendous amounts of money for Gerry.

On recross by petitioner's counsel, Kraft was asked whether the prosecutor (Mr. Pollack) had asked him to remember the name of Richie Perry (4876). The witness denied this and specifically stated that he did not discuss his prospective testimony with the Government on Friday, Saturday, and Sunday and it was only that morning that he told Mr. Pollack about petitioner Perry (4878).

The Government then contended that in light of this cross examination implying that the witness fabricated his testimony, it would have to reveal the full statement. Argument took place as to precisely when Kraft informed the Government of the information regarding petitioner Perry. The Government represented that he had asked the witness that previous Friday (April 19th) after he had testified why he did not think it was a tout scheme. Because so many people were "milling" about, he never got an answer. Accordingly, he again asked Kraft that Sunday (April 21st) on the telephone why he did not think it was a tout scheme and Kraft then told him that he had been informed by Pullman that Gerry was providing information to Richie who was related to the mob and you don't tout the mob (4878, 4887).

Over objection, Kraft was permitted to testify that the "second reason I didn't think I was in any tout scheme was that when Mr. Pullman told me about Mr. Perry, he also added that Mr. Gerry was betting with Mr. Perry who is connected with a fierce mob in Brooklyn" (4927).

When another Government witness, Pullman, was questioned by the Government, he was asked whether he told the FBI that "Richie whose last name you didn't know but who Gerry on several occasions referred to as the son of a made man in Brooklyn." Pullman responded, "I never called a man a 'made man' in my life" (6853).[3] Prior to this the court instructed the jury that the statement did not constitute evidence that petitioner Perry was in fact a member of any organization (6842). Witness Proman in turn was questioned repeatedly by the Government as to whether he told the "FBI with regard to Richie Perry, you stated that you knew Perry as an individual who used to go to Sherman's room at the Carvel Inn? You knew Perry as a bookmaker" (7827). Although the question was objected to and the court instructed the jury that the questions were for impeachment purposes only, the court thereafter also permitted Agent French to testify that Proman had told him that Perry was a bookmaker (7827, 8166).

Government Misconduct

In the midst of the trial, Mr. Bobick, counsel for defendant Gerry, informed the court that on April 16, 1974, Mr. Pullman appeared at his office and disaffirmed any knowledge of race

3. A "made man" is a term used to typically refer to a member of the mob.

fixing (5295-5296). At this time, Pullman agreed to conceal a tape recorder on his person for the purpose of taping Government conferences with the witnesses, Kraft and Rothstein (5295-5296). Accordingly, Pullman taped conferences in the Government office on April 18th, 19th, and 21st (5276). Statements of the tape reflected the following: an agent telling Pullman that Pollack controls the judge; representations that Pollack and the judge are "real good" friends (D34-35, 113-114, 116-117); statements that Pollack had the judge in his "hip pocket" (D117-120); Pollack's guarantee that Pullman will not go to jail and his assurances to Pullman that he is close to the judge since the judge had written his letter of recommendation for admission to the New York Bar (D210-217); prosecutor Meyerson's referral to the judge in this case on a first name basis when he stated "tell him how close Michael and Orrin are" (D120).

Additionally, petitioner Perry's counsel pointed out that the tapes specifically contradicted the Government's assertion that he had not spoken to Kraft regarding why he did not think it was a tout scheme until the following Sunday (5354; D59)71, 92-96, 103-105). Tapes also reflect that it was the Government agent who first suggested to Kraft that petitioner was connected with the mob.

The court at first was uncertain how to proceed in this matter (5278). Defense counsel moved for a dismissal of the indictment on the ground of gross prosecutorial misconduct, claiming that the total circumstances offended any sense of justice (5283). Alternatively, counsel requested an immediate hearing, to see if the agents and the prosecutors would admit to the improprieties (5284, 5363).

After listening to the tapes (5344-5350), the court concluded that although there were some matters in the tapes that were disturbing, there was no reason to dismiss the indictment (5374). The court, however, did indicate that it was improper for Mr. Pollack to state that the court had written a letter to the Bar in his behalf as indicating any likelihood that he could get anything from the court (5350). Mr. Pollack in turn stated: "I agree with the court that there are things said by myself which are improper" (5351).

Thereafter, counsel again urged the court to reconsider its motion for dismissal, claiming that the court's integrity had been impugned. The court responded that because someone "insults me I must dismiss a case" (5533). Whereupon, counsel asked the court to take a position on each allegation affecting the court's integrity rather than just stating a general denial, but this request was denied (5535-5536).

REASONS FOR GRANTING THE WRIT

I.

Due process requires that a hearing be held to determine the competency of a government witness whose mental state has been seriously challenged by the defense.

This Court has never determined the procedure that the courts must follow when a witness' competency to testify is seriously challenged by the defense. The circuit courts passing on this particular question have held that the competency of a witness to testify before the jury is a threshold question of law

which lies exclusively in the trial court's discretion and that the nature of any inquiry also rests in the discretion of the court. *United States v. Benn,* 476 F.2d 1127 (D.C. Cir. 1972); *United States v. Tannuzo,* 174 F.2d 1127 (2d Cir. 1949); *Henderson v. United States,* 218 F.2d 14 (6th Cir. 1955). It is petitioner's position that due process requires that where the defense presents a serious challenge to a witness' competency, a full hearing must be held to resolve that issue. The present case amply demonstrates the necessity for such a hearing.

The only evidence in this voluminous record connecting petitioner Perry with the crimes charged was the testimony of Bruce Cussell, a man who not only had a lengthy history of mental illnesses but who was also a patient in a mental institution at the time his testimony was tendered. Despite the fact that the court was well aware of Cussell's precarious mental state, the court failed to hold a hearing regarding Cussell's competency to testify.

The very nature of Cussell's illness should have put the court on notice that a hearing regarding his competency was warranted. This was not a witness who simply had a prior history of mental illness. See *United States v. McFarland,* 371 F.2d 701 (2d Cir. 1966). This was a witness who from the age of 16 to the present had been diagnosed as a schizophrenic and who had been confined in four different institutions. This was also a witness who had been confined in such an institution both immediately before and after the period encompassed in the alleged conspiracy and had even been taken from a mental institute while under the influence of drugs in order to testify at the trial. To believe Cussell, one would have to accept that the

dates between February and April 1973 were one of his few lucid periods. Moreover, Cussell admitted, albeit reluctantly, and the psychiatric reports so reflected the fact that he experienced frequent hallucinations and heard voices telling him what to do. And even more revealing are his many past acts which at best can only be characterized as the bizarre conduct of a sick man.

In denying counsel's applications for a hearing, both the court and the Government relied on the psychiatric reports wherein it was stated that Cussell could testify from memory without impairment due to psychiatric problems. Their reliance was misplaced.

First, the fact that Cussell could testify from memory did not preclude the very real possibility that his illness could cause him to distort facts, thus rendering any testimony he might give inherently untrustworthy as a matter of law. This distinct possibility is not without support in this record. Cussell's testimony was equivocal, contradictory, and conspicuous for its lack of recollection. The court after direct examination of this witness remarked to counsel "you can argue that the testimony is inaccurate and you may have some basis for it," (3648) or "I think there are a number of features of this witness' testimony that the jury can certainly consider bearing, on the truth or accuracy of his recollection" (3647). In this regard, Cussell's assertion that he could overhear defendant Gerry telling appellant over the telephone which horses to bet clearly defies belief and is especially suspect since an admitted symptom of Cussell's illness was his hearing of voices. Counsel, recognizing this, immediately moved to strike his testimony at that point.

Furthermore, it is obvious that the Government went to great lengths to prepare this witness. Before the Grand Jury, Cussell's testimony was limited to simple yes or no answers and before testifying at trial, he met with Government prosecutors for seven consecutive days and agreed with counsel's inquiry that "they were drumming it into (his) head, all of the same reports, the same grand jury testimony, same statements" (3814). Such extensive coaching had to have a tremendous impact on this vulnerable witness who without a doubt was highly susceptible to suggestion.

Second, although counsel requested that they be permitted to cross-examine the Doctors who prepared the psychiatric reports, the court denied the request. Only by cross-examination could the credibility and the truthfulness of these reports be properly ascertained. See *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965).

The question of whether a witness is competent to testify cannot be left to the trial court's discretion. First, in the absence of expert opinions, the courts are not qualified to make such a judgment. And second, a very real danger exists that the courts will apply arbitrary and capricious standards in determining the issue of competency and as a result, different courts will apply different standards. Either a witness is competent or he is not and one procedure should be set to determine this critical question.

As Cussell was the only witness to connect petitioner with any knowledge of a bribery scheme, it should be found that petitioner was entitled to a full hearing to determine whether in fact Cussell was competent to testify against him.

II.

The deliberate elicitation by the prosecution of evidence that petitioner Perry was associated with the mob destroyed any possibility of his receiving a fair trial as mandated by the Due Process Clause of the Federal Constitution.

The Government deliberately elicited testimony that petitioner Perry was connected with a "fierce mob" in Brooklyn and that he was the son of a "made man." Further testimony by Government witnesses established that he was engaged in the illicit trade of a "bookmaker." After hearing such evidence with its sinister connotations, the jury had to be convinced that petitioner Perry was capable of committing any crime including the crimes for which he was then on trial.

This type of evidence is so inherently prejudicial that under no circumstances should the court have allowed it to go before the jury. By permitting such testimony, the Government was in effect establishing petitioner Perry's guilt through his reputed association with one of the most feared groups known to the public — the "Mafia." To prove a defendant's guilt by his alleged association with any group, let alone the mob, is clearly repugnant to any concept of due process.

No valid reason can be advanced to justify the admission of such damning evidence. Since initially the court was not predisposed to risk serious error by permitting the Government to elicit this testimony on its redirect examination, it cannot be claimed that petitioner's recross of Kraft opened the door to this prejudicial testimony. Counsel only attempted to bring out on

his recross that his client's name had been suggested to this witness by the prosecutor over the weekend. This was a legitimate attack on the credibility of this witness and had nothing whatever to do with the mob. Even assuming that the Government was correct in contending that this recross constituted an attack on Kraft's testimony as a recent fabrication, Kraft's additional testimony referring to the mob did not make it any less of a fabrication and did not thus serve the purpose which the Government ostensibly intended it for.

In its decision, the Second Circuit lumped the effects of the mob evidence as against both petitioner Perry and Gerry. The Court ignored the fact that of all the 23 defendants in this case, it was only Perry who was singled out and ominously labeled a mobster. In every single instance complained of, it was petitioner and not Gerry who was denominated a member of the "fierce mob," a son of a made-man, and a bookmaker. As the prejudice inherent in the former two terms is readily discernible, the Second Circuit in reference to the term bookmaker stated:

> "It is difficult to see how the use of the term 'bookmaker' which does not have an inherent organized crime connotation could have been unduly prejudicial or shocking in a trial involving allegations of fixing horse races." Slip op. at p. 2595.

While perhaps the Second Circuit would have been correct in reaching this conclusion if the "bookmaker" testimony was viewed separately from the other evidence in the case, unfortunately, this was impossible. The court's decision

overlooked the fact that the Government not only used evidence depicting petitioner Perry as a bookmaker but the Government thereafter presented two admitted bookmakers as witnesses (Zito and Haberstraw) who admitted to committing almost every conceivable type of crime. The jury simply had to associate petitioner Perry, the bookmaker, with the activities of these two hardened criminals who also professed to be bookmakers and had to be convinced that Perry was also a dangerous mob member.

The Court of Appeals also appeared to justify the admission of all this damaging mob of evidence on various grounds such as bearing on Kraft's state of mind and that the exclusion of the reference to the term "bookmaker" by the trial court would have impermissibly limited the Government's right to refresh the recollection of an obviously recalcitrant and recanting witness. Notwithstanding Perry's contention that such references were entirely unnecessary to the Government's case, it is nevertheless blatently unfair that of the 23 defendants in this case, only petitioner Perry had to bear the prejudicial brunt of these evidentiary concessions. Such prejudice was further exacerbated when the tapes unequivocally established that Perry was not associated with any mob and was a straight gambler and not a bookmaker. Despite the fact that the Government was well aware of this, they were still permitted to capitalize on this slanderous testimony to insure their convicting Perry of the crimes charged.

Finally, in this regard, the Second Circuit stated:

> "We find that when these isolated references are viewed in the context of the testimony during

> which they were elicited and when weighed in the perspective of an eleven week trial which produced over ten thousand pages of transcript, the appellants were neither unduly prejudiced nor denied a fair trial."

This conclusion overlooks the hard fact that after their verdict, some of the jurors informed Perry's counsel that Perry was convicted only because they thought that he was an enforcer for the mob. This factor is indeed part of the record in this case as counsel in a motion to set aside the verdict specifically set forth the details which motion was denied without a hearing by the trial court. Hence, regardless of whether the mob references are to be viewed only as isolated references, these references did have a devastating and negative impact upon the jury when deliberating upon the question of appellant's culpability. It must also be pointed out that it would be extremely difficult for any juror to forget the term "fierce mob" as applied to Perry whether the trial lasted only a few days or lasted many months. The stigma of such an accusation would remain implanted in the juror's minds despite even the most stringent instructions from the court.

Since petitioner's conviction was predicated on large part on his reputed association with the mob and since the concept of "guilt by association" is repugnant to even the most rudimentary elements of due process, this Court should grant review of this case in order to insure the right of a defendant to a fair trial.

III.

The testimony of a mathematician whose sole purpose was to establish the possibilities or probabilities that the defendants committed the crimes charged undermines the principle that a defendant's guilt must be established beyond a reasonable doubt.

This Court has never decided whether a mathematician's testimony can be introduced to show the probability that a defendant committed the crime charged. It is petitioner Perry's position that by permitting the testimony of the mathematician, the court was allowing his guilt to be predicated on probabilities, possibilities, or the question of chance. Such testimony vitiated the cardinal principle in every criminal case that guilt must be established beyond a reasonable doubt.

Dr. Yaspan's testimony had no place in this trial. His study encompassed races run in 1972 and not the 1973 Superfecta races which the defendants were charged with fixing, and it was conceded that the expert's system could not have been used by the defendants even had they deemed it worthy of implementation. But most important, Dr. Yaspan's system was based only on the odds induced by the public who generally lose because of their lack of accompanying racing expertise.

Since the only evidence connecting petitioner with any knowledge of race fixing was the testimony of Bruce Cussell (see I) it cannot be argued that the mathematician's testimony did not unduly influence the jury when deliberating upon the question of petitioner's culpability. The Second Circuit specifically noted that there had been an "overkill" of such expert testimony.

Hence, permitting petitioner's conviction to be based on large part on the probability that he committed a crime not only undermined the reasonable doubt standard but deprived him of his due process right to a fair trial.

Accordingly, this Court should grant the instant writ of certiorari and determine the role, if any, that statistics should play in a criminal trial.

IV.

As a prophylactic measure, this Court should grant certiorari in order to determine whether the lawless conduct of the Government is so offensive to the administration of justice that an acquittal should have been ordered as a matter of due process.

In this case, the Government has committed a series of acts which constituted a clear affront to the integrity of our criminal justice system and which should compel the dismissal of the indictment against petitioner Perry. *Hoffa v. United States,* 385 U.S. 293 (1966); *Elkins v. United States,* 364 U.S. 206 (1966).

The Government in this case acted with a total disregard to the dignity of the trial court and deliberately used the vast power of its office to induce its witnesses to testify against the defendants. Both Government agents and the prosecutors (Pollack and Meyerson) represented to Pullman and Rothstein who feared a jail term that they had nothing to worry about as they were the ones who controlled the judge. In fact, one agent even went as far as making the derogatory comment that Mr.

Pollack had the judge in "his hip pocket," and Meyerson displayed his familiarity with the judge by referring to him on a first name basis when he stated to another agent "tell him (Pullman) how close Michael and Orrin are." Pollack then buttressed these conclusions by telling Pullman that he and the judge had tried many cases together and that the judge even wrote his letter of recommendation to the New York State Bar.

Such conduct cannot be condoned as it represents a very real threat to the integrity of our judicial system. One of the prime objectives of the trial is a search for the truth. It is seriously doubted whether the truth could or would emerge if the Government is permitted to extort testimony from its witnesses by falsely representing that not only does their office prosecute the crimes but that their office likewise controls the judiciary. Such witnesses, especially if they are also confronted with criminal charges, would have to feel intimidated by the Government's alleged dual function and would feel compelled to tailor their testimony to the Government's vantage.

Apparently that is what occurred in this case. While there is only concrete proof that the Government in the three days which were taped by Pullman deviated sharply from the proper course of conduct, such conduct casts a blanket of suspicion over all its actions in this trial. This is particularly true given the fact that three Government witnesses actually recanted their Grand Jury testimony and claimed that their prior testimony was obtained by threats, intimidation, and coercion on the parts of the Government agents which resulted in their conforming their stories to that which the Government wanted to hear.

While recantations of witnesses are usually regarded with suspicion in the courts, that suspicion in this case must be directed against the Government since it is highly unusual that three witnesses in one case would recant their testimony for similar reasons.

Confronted at trial with evidence of their misconduct, Mr. Pollack was forced to admit to a "few improprities" (5359). Such conduct went well beyond the bounds of impropriety and must be considered outright unlawful.

Even more shocking in this case was the Government's deliberate misrepresentation of facts to the court and its willful subornation of perjury of its witness Kraft. This record establishes that the Government both blatantly misrepresented the facts to the court concerning its acquisition of the "fierce mob" testimony and knowingly suborned the perjury of its witness Kraft.

The Government (Mr. Pollack) flatly represented to the court that it had asked Kraft for the first time after he had testified that Friday (April 19th) why he did not think it was a tout scheme but because so many people were "milling" about he never got an answer. Accordingly, he again asked Kraft on the telephone that Sunday (April 21st) why he did not think it was a tout scheme and at this point Kraft allegedly revealed his reasons (4878, 4887). Kraft in turn maintained on recross that he did not discuss his prospective testimony with the Government on either Friday, Saturday or Sunday and it was only that morning that he told Mr. Pollack about petitioner Perry (4878).

However, the recordings which Pullman secretly made of the Government conferences on April 19th conclusively establish that the Government lied to the court and permitted its witness to lie on the stand. The tapes reveal that Kraft's testimony was in fact discussed in detail by both the prosecutors in this case and Government agents, and it further reveals that it was the Government who initially suggested to Kraft the reason why he did not think it was a tout scheme.[4]

It is difficult to understand why the court did not attempt to correct this wrong since petitioner's counsel specifically brought it to the court's attention that the tapes contradicted the Government's assertions (5354). The court in ignoring counsel's claim was thus derelict in its responsibility of making certain that a fair trial was being afforded to the defendants, especially petitioner Perry who was the most affected by this evidence.

Finally, the bad faith of the Government in introducing this mob testimony is again demonstrated by the tapes of April 21st which reveal that Pollack knew full well that Perry was not

4. Specifically, the tapes show that after Kraft had finished testifying, he went to Mr. Pollack's office where a discussion ensued concerning how to counter defense's claim that it was a tout scheme. Kraft first suggested that both the charts and the numbers given to him which showed up exactly as they said refuted the existence of a tout scheme. Mr. Pollack in turn felt that a better answer was the aura surrounding harness racing and revealing Kraft's extensive background in this area. To this Kraft responded that he could not say that and asked Mr. Pollack whether he was saying that all races were crooked. At this point, agent Fanning interrupted and queried whether he (Gerry) was touting Richard Perry and the Varios. Whereupon Kraft agreed and stated that the jury would not buy that he was touting the Vario people. When the question arose as to whether the jury would know who the Vario people were, agent Fanning replied that the jury would know since Vario, the "gold bug," had been in and out of the papers for two years (D59-71, D92-96, D103-105).

associated with any mob and that he was a straight gambler and not a bookmaker (D200-208). Consequently, the Government willfully used slanderous and false testimony to aid them in their case.

In answer to petitioner's contention that the lawless conduct of the Government in this case was so shocking to the administration of justice that an acquittal should have been ordered as a matter of due process, the Second Circuit insinuated that Pullman entrapped the Government into making its outrageous statements. See slip opinion at page 2603. While the Court characterized the many statements of the prosecutor and the Government agents as "both deplorable and unprofessional," the Court clearly implied that such statements were made only because of Pullman's enticement. It is difficult to understand how such conduct on the part of the Government can be so easily excused. Certainly, the conduct of the Government attorneys should be held to a far more exacting standard than that of their own witness.

Hence, this Court in the exercise of its supervisory powers should rectify the wrong done to the defendants by accepting review of the case. *Mesarosh v. United States*, 352 U.S. 1 (1956).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Jacob P. Lefkowitz
Attorney for Petitioner

Julia P. Heit
Of Counsel

APPENDIX A — JUDGMENT AND OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 548, 692—September Term, 1974.

(Argued January 13, 1975 Decided March 28, 1975.)

Docket Nos. 74-2100, 74-2106

UNITED STATES OF AMERICA,

Appellee,

—v—

FORREST GERRY, JR. and RICHARD PERRY,

Appellants.

Before:

LUMBARD, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from judgments of conviction after jury trial in the Eastern District of New York, Orrin G. Judd, *Judge*, finding appellants guilty of influencing the outcome of harness races by bribery and of conspiracy to do so in violation of 18 U.S.C. § 224.

Affirmed.

TERRENCE M. BROWN, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney, Eastern District of New York, and Peter M. Shannon,

Appendix A

Jr., Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellee.*

FREDERICK P. HAFETZ, Esq., New York, N.Y. (Goldman & Hafetz, New York, N.Y., on the brief), *for Appellant Forrest Gerry, Jr.*

JULIA P. HEIT, Esq., New York, N.Y. (Jacob P. Lefkowitz, New York, N.Y., on the brief), *for Appellant Richard Perry.*

LUMBARD, *Circuit Judge:*

Following an eleven-week jury trial in the Eastern District of New York, the appellants Forrest Gerry and Richard Perry were on May 31, 1974 convicted of influencing the outcome of harness races by bribery (count 1) and of conspiring to do so (count 2) in violation of 18 U.S.C. § 224. The indictment which set forth the charges against Gerry and Perry named twenty-eight individuals as defendants. Of these, two pled guilty;[1] five were severed;[2] the trial judge directed verdicts of acquittal as to five; and, the jury acquitted fourteen. Only the two appellants were convicted.

On July 19, 1974 the appellant Gerry was sentenced to concurrent terms of four years imprisonment on each of the two counts and was fined ten thousand dollars on each count. The appellant Perry was sentenced, also on July 19, 1974, to concurrent terms of two and one-half years

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1 Seymour Rothstein see n.15 & p. 2596 *infra*, pled guilty prior to trial. Michael Sherman, see n.5 & p. 2588 *infra*, was a fugitive at the start of the trial and pled guilty after his arrest.

2 One of those severed, Joseph Pullman, see pp. 2602-2603 *infra*, received a grant of immunity and testified at trial. After the trial was concluded the indictments were dismissed on motion of the government as to the four other defendants who had been severed.

imprisonment on each of the two counts and was fined ten thousand dollars.

Perry was sentenced under 18 U.S.C. § 4208(a)(2) with eligibility for parole after six months imprisonment.

As is not surprising after a multi-defendant eleven-week trial, the appellants raise many claims of error. These alleged errors relate generally to (1) the sufficiency of the evidence; (2) the correctness of various evidentiary rulings made by the trial judge; (3) the use, consequences, and implications of tapes surreptitiously recorded at the prosecutor's office; and (4) the propriety of both the prosecutor's summation and the court's charge. We find that none of these claims are substantial and we therefore affirm.

I. *The Evidence*

The record, viewed in the light most favorable to the government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), reveals a scheme master-minded by Gerry and implemented by Perry and others which operated from January through April 1973 and which had as its purpose the illegal fixing of a specific type of harness race, the "superfecta." A "superfecta" race is a harness race in which there are generally eight horses competing. Its uniqueness does not lie in the way the race is run but in the way that the wagering is conducted on the race. There are basically three types of "superfecta" bets: a three dollar bet; an eighteen dollar bet; and, a seventy-two dollar bet. To win a three dollar bet the bettor must select the first four horses in the exact order in which they cross the finish line. In the eighteen dollar bet, also known as a "key box," the bettor selects four horses and designates one of the four to finish in first place. The bettor does not, however, have to select the exact finishing order of the other three horses he selects. In the seventy-two dollar

bet, also known as a "box bet," the bettor must choose merely the first four horses; he does not have to select any order in which they finish.

A vice president of the Off Track Betting Corporation, Michael Shagan, testified as to the statistical probabilities of winning a "superfecta" bet. He explained that in an eight horse race there were 1,680 possible combinations of four horses finishing in an exact order in the first four positions. Therefore, the odds against winning on a three dollar bet were 1,680 to 1. If, however, a bettor could eliminate one or two horses from his consideration the odds would change dramatically. As Shagan testified, if a bettor were only to consider six horses rather than eight then on a three dollar bet the odds would be reduced from 1,680 to 1 to 360 to 1.

Viewed in another perspective, it would cost $5,040 to place three dollar bets on all possible combinations of four horses in an eight horse race. It would cost half of that amount or $2,520 to place three dollar bets on all possible combinations of four horses in a seven horse race and just $1,080 if only six horses are considered. Since in 1973 the average return for a winning "superfecta" ticket was $3,000, a bettor who could definitely eliminate one or two horses from consideration could afford to bet on all the possible combinations remaining and have a near mathematical certainty of winning more money than he spent on purchasing the wagering tickets.

The attempt to eliminate one or more horses from consideration in the "superfecta" betting formed the basis of the conspiracy exposed at the trial. Bribery of harness race drivers was the means by which the conspiracy was implemented.

The evidence showed that the appellant Gerry offered bribes to certain race drivers to finish in specified positions, usually in the last four places or "out of the money"

in a particular "superfecta" race. Allen Cantor, a harness race driver who was named as a co-conspirator and who testified at trial under a grant of immunity, stated that on January 24, 1973 he had a discussion with the appellant Gerry near Roosevelt Raceway about the "superfecta" race to be run that evening in which he, Cantor, was scheduled to drive one of the horses. Cantor testified that Gerry asked him to "finish out of the super" and told him that if he did so Gerry would give him either a thousand dollars or a ticket on the winning combination. Cantor admitted having told Gerry he would prefer the thousand dollars and he also admitted that he had received $800 from Gerry on the next day, his horse having finished seventh in the "superfecta" race. Another harness race driver, Randolph Perry,[3] also testified to a conversation with Gerry which, though more equivocal than the Gerry-Cantor conversation related above, the jury could reasonably have inferred was an attempt by Gerry to bribe Randolph Perry to finish out of the first four positions.

Having offered bribes to one or more drivers to insure that their horses would be in specified positions, Gerry would then bet large sums of money covering all possible combinations in which those horses were in the appropriate positions. Though Gerry bought a large number of "superfecta" tickets himself, most of the actual placing of the bets was done by Gerry relaying the preferred combinations to other gamblers. One of the other gamblers to whom Gerry relayed the combinations was the appellant Perry.

Perry's relationship with Gerry and his role in the conspiracy was explained by Bruce Cussell, a former employee of Perry's who testified in behalf of the govern-

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3 The record fails to show any familial relationship between this witness and the appellant Richard Perry.

ment.[4] Cussell, who was twenty-eight years old at the time of trial, had attended elementary school with Perry and had known Perry "off and on" his whole life. Beginning in February or March 1973 Perry paid Cussell two hundred dollars per week to perform certain services for him. As a daily routine Cussell would bring the New York Times, breakfast and a trotting sheet for the evening's races to Perry's house in Brooklyn where the two of them would wait a call from Gerry. At approximately 11:00 a.m. or noon Gerry would call and during the call Perry, using the trotting sheet Cussell had brought, would make a circle next to the dead horses, *i.e.*, the ones that were not to finish in the first four positions, and make an "x" next to those that should be "keyed." Cussell testified that Perry had told him that he had fixed races with Gerry and that Gerry would contact the drivers and give them either one thousand dollars or a winning ticket.

Following his daily call from Gerry, Perry would, according to Cussell's testimony, call Michael Sherman[5] and Peter Vario[6] and relay to them the combinations he had received from Gerry. Perry would then give Cussell between $9,000 and $15,000 which was to be used to purchase tickets on the designated combinations. After purchasing the tickets at an Off Track Betting Office,[7] Cussell would hand the tickets over to Perry and then accompany him to the race track.

When the "superfecta" race had been run Perry would generally pass the winning tickets on to others to cash

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4 Cussell's competency as a witness is discussed at pp. 2589-2590 *infra*.

5 See n.1 *supra* & p. 2584 *infra*.

6 A co-defendant who was acquitted by the jury.

7 During the time period covered in this indictment the Off Track Betting Corporation did conduct "superfecta" betting. It has, however, discontinued this type of betting.

since persons cashing winning "superfecta" tickets over $900 are required to complete and verify an Internal Revenue Service form.[8] Occasionally, Gerry and Perry would cash tickets themselves. During the three and one-half months of the conspiracy, January through April of 1973, Gerry was responsible for having placed over one million dollars in bets which resulted in gross winnings of approximately two and one-quarter million dollars.

The defense attempted to establish that a good handicapper could do very well in "superfecta" betting and they called George Levy, President of Roosevelt Raceway, who testified that prior to any indication of wrongdoing he had suggested that the "superfecta" be terminated because he was afraid of what a good handicapper with ample funds could do. The defense also called racing experts who had either been present at or had viewed films of the races that had allegedly been "fixed." These experts testified that they had observed no wrongdoing on the part of the defendant drivers. None of the defendants testified.

II. *Sufficiency of the Evidence*

The recital of the evidence disposes of Gerry's first claim of error, that the evidence was insufficient. Moreover, Gerry's brief concedes that "viewed in the light most favorable to the government, the evidence against Gerry is sufficient."[9]

Perry claims that the government failed to produce sufficient evidence to establish that he knowingly participated in any bribery scheme and that, excepting the testimony of

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8 The form required to be filed is Internal Revenue Service form 1099. Those cashing winning tickets on a commission basis are often referred to as "ten percenters."

9 Brief for Appellant Gerry at 21.

Bruce Cussell, all that was shown was that he had participated in a handicapping scheme with Gerry. Perry argues that we should not consider the testimony of Bruce Cussell as he was an incompetent witness. We disagree.

III. *Competency of Witness Cussell*

Perry argues that the failure to hold a hearing to determine whether Cussell was a competent witness requires reversal. He does not contend that the fact that Cussell had been a patient at a mental hospital rendered him incompetent to testify as a matter of law. *United States* v. *McFarland,* 371 F.2d 701, 705 (2d Cir. 1966) *cert. denied,* 387 U.S. 906 (1967); 2 J. Wigmore, *Evidence* § 497 (3d ed. 1940). He does, however, argue that the trial court erred in not holding a hearing to explore the competency issue.

On April 8, 1974, during the trial but prior to Cussell's being called as a witness, a defense attorney asked the Court to conduct a hearing on Cussell's competency to testify. The prosecutor replied that he had received a letter that morning indicating that Cussell was not suffering from any impairment of memory or ability.[10] Later the same day Perry's attorney asked Judge Judd when he should arrange to have a defense psychiatrist present in court for the voir dire examination on Cussell's competency. Judge Judd instructed him to have the psychiatrist present at 2:00 p.m. the following day, April 9, 1974. On the morning of the ninth the government supplied the defense attorneys with a copy of the letter, referred to the preceding day, from Dr. Parlade dated April 5, 1974 which indicated that Cussell's mental condition would not in any way effect his testimony. The defense psychiatrist was

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10 At this point in the trial it was not clear from whom the government received the letter. It later became evident that the prosecutor was referring to a letter from Dr. Parlade dated April 5, 1974.

apparently never produced that afternoon or anytime thereafter and Cussell took the stand on April 15, 1974 without any objection.

Cussell's mental competency and his psychiatric history were fully explored both on direct and cross-examination. He was under psychiatric care and on medication at the time of trial and had a history of mental illness. During cross-examination another request was made to disqualify Cussell on the grounds of mental incompetency. Although the trial judge had not explicitly ruled that Cussell was competent to testify, he had permitted Cussell to take the stand after reviewing the correspondence from Dr. Parlade.[11] Further, when the competency argument was raised on cross-examination, Judge Judd stated that Cussell's answers had been comprehensible and intelligent and that his testimony had been corroborated on many points by the testimony of government agents. From all this we think it readily apparent that, notwithstanding the lack of an express finding, Judge Judd made it clear to all parties that he found Cussell competent to testify.

The competency of a witness to testify before a jury is a threshold question of law which lies exclusively in the trial court's discretion. *United States* v. *Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1972). When competency is questioned there is no legal requirement that the trial judge conduct a formal hearing. There must be such an inquiry as will satisfy the Court that the witness is competent to testify but the form of that inquiry rests in the discretion of the trial court. *Henderson* v. *United States*, 218 F.2d 14, 17-18 (6th Cir.), *cert. denied*, 349 U.S. 920 (1955). The trial judge's determination on the question of competency

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11 In addition to the April 5, 1974 letter, Dr. Parlade sent another letter dated April 8, 1974 is which he reaffirmed his opinion that Cussell had no memory impairment and that his mental condition would not affect his testimony.

will not be disturbed unless it was "clearly erroneous." *United States* v. *Crosby*, 462 F.2d 1201, 1202 (D.C. Cir. 1972); *United States* v. *Hardin*, 443 F.2d 735, 737 (D.C. Cir. 1970).

Having decided to permit Cussell to testify, Judge Judd repeatedly stated both throughout the trial and in his charge that Cussell's credibility was a question for the jury. Once a threshold finding of competency to testify is made by the court, it becomes the function of the jury to determine credibility. *United States* v. *Benn, supra*, 476 F.2d at 1130. Judge Judd's finding of Cussell's competency as a witness was not clearly erroneous and he properly instructed the jury regarding the determination on Cussell's credibility.

IV. *Alleged Prejudicial References*

Both appellants argue that the trial court erred in not excluding testimony that alluded to a "fierce mob," a "made man," and a "bookmaker." They contend that the introduction of this testimony was a deliberate attempt by the government to associate them, in the minds of the jurors, with the Mafia and thereby deprive them of a fair trial. We find that when these isolated references are viewed in the context of the testimony during which they were elicited and when weighed in the perspective of an eleven-week trial which produced over ten thousand pages of transcript, the appellants were neither unduly prejudiced nor denied a fair trial.

The reference to a "fierce mob" was made by David Kraft who, on direct examination, testified that from February through April of 1973 he received phone calls from Gerry telling him which horses to bet on in the "superfecta." Kraft relied on Gerry's information because Gerry told him that he could "reach" the drivers. On cross-examination Kraft admitted that he had lost money by

betting on Gerry's information and that he felt that he was a "victim of something." Asked if he thought that he was the victim of a "tout" scheme,[12] Kraft replied that he did not believe so. In an attempt to clarify this testimony and to rehabilitate its witness the government, on re-direct examination, sought to bring out the reasons underlying Kraft's belief that it was not a "tout" scheme: first, that too many horses were finishing exactly where they were supposed to; and, second, that according to Joseph Pullman, Gerry was giving the combinations to a guy by the name of Richie in Brooklyn who was connected with the mob and "you just don't tout those kind of people." The government asked for a ruling on the admissibility of this testimony and Judge Judd at first refused to allow testimony about the second reason which related to mob involvement.

When, however, on re-cross examination, Perry's attorney attempted to show that Kraft's testimony about Perry was of recent fabrication, Judge Judd reversed himself and decided that with a limiting instruction the second reason for Kraft's disbelieving that it was a "tout" scheme (*i.e.*, that the mob was involved and no one touts them) was admissible. Both immediately before and after the admission of this testimony the jury was instructed to consider it only to the extent that it related to the state of mind of the witness Kraft and that it was "not to be taken as evidence that anyone belongs to any mob."

The reference to a "made man" occurred during the testimony of Joseph Pullman, an indicted co-conspirator

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12 The charge to the jury described the questioned "tout" scheme as follows:

> "The implication in the cross-examination of Mr. Kraft was that Mr. Gerry was a con artist, who induced his betting clients to pay him money that he represented to be bribes but that he never actually bribed anybody and just put the money in his own pocket."

who testified under a grant of immunity. At trial Pullman denied that his grand jury testimony was truthful.[13] The government attempted to refresh his recollection with statements he had allegedly made to agents of the FBI. One of these FBI reports referred to a "Richie" as "the son of a made man in Brooklyn." When asked if he had made such a statement to the FBI, Pullman denied that he had ever in his life called anyone a "made man." Pullman testified that he "wouldn't use those words because made man doesn't mean nothing to me. It could be a businessman that was made, financially." Although Pullman denied knowing the meaning of the term "made man" the appellants argue that the term is well-known and connotes membership in the Mafia.

The third and final alleged "mob" reference to which appellants object, *i.e.*, that Perry was a "bookmaker," occurred during the testimony of Marvin Proman. A groom and trainer, Proman had testified in the grand jury about the bribery of harness race drivers. At trial Proman, like Pullman, denied that he had told the truth to the grand jury.[14] The government attempted to impeach Proman's credibility with prior statements he had allegedly made to the FBI. One of those prior statements, which Proman did not recall at trial, was that Perry was a "bookmaker" from Brooklyn. At the time of this line of questioning, the jury was instructed that the questions were allowed solely to impeach Proman's credibility and that the mere

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13 The admissibility of Pullman's grand jury testimony is discussed at p. 2600 *infra*.

14 After the government had closed but before the defense began, Proman, who had been missing, was located in California and brought back to New York to testify. Judge Judd permitted the government to reopen its case so that Proman could be called. The admissibility of his grand jury testimony is discussed at pp. 2601-2602 *infra*.

asking of the questions did not justify a finding that the statements made in the questions were true.

Appellants contend that admission of these references to "fierce mob," "made man" and "bookmaker" violated their due process rights by permitting guilt to be established merely by an alleged association with criminal companions, in particular, the Mafia. *United States* v. *Vaught*, 485 F.2d 320, 323 (4th Cir. 1973); *United States* v. *Tomaiola*, 249 F.2d 683 (2d Cir. 1957). Exclusion of the reference to a "bookmaker" by the trial court would have impermissibly limited the government's right to refresh the recollection of an obviously recalcitrant and recanting witness. Further, it is difficult to see how the use of the term "bookmaker," which does not have any inherent organized crime connotation, could have been unduly prejudicial or shocking in a trial involving allegations of fixing horse races. Finally, the limiting instruction given by the trial court was clear and correct. Even assuming that the jury, unlike this panel, understood the meaning of "made man" that phrase was an integral part of the government's attempt to refresh the recollection of yet another recalcitrant and recanting witness.

The reference to a "fierce mob" poses a greater potential for prejudice than either "bookmaker" or "made man." However, in light of the attempt on cross-examination to show that Kraft was being victimized by a "tout" scheme, the elicitation of the two reasons why Kraft did not believe it was a "tout" scheme appears to have been a reasonable and permissible response by the government. Again, the trial court immediately gave the proper limiting instruction that the testimony was to be considered only as it related to Kraft's state of mind, not as evidence that any of the defendants was a member of any mob. Thus each of the three contested references was properly admitted. We fail to see how any one of them standing

alone or all three taken together deprived the appellants of a fair trial. See generally *United States* v. *Polizzi*, 500 F.2d 856, 888 n.54 (9th Cir. 1974); *United States* v. *De Masi*, 445 F.2d 251 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); *Carbo* v. *United States*, 314 F.2d 718, 739-40 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

V. *Testimony Regarding State of Fear*

Another evidentiary ruling challenged by the appellants involved the admission of testimony elicited to impeach a recanting witness' denial of fear. Having pled guilty to one count of the indictment in this case, Seymour Rothstein testified as a government witness on April 23, 1974 and gave testimony damaging to Gerry and other defendants. No defense attorney cross-examined Rothstein. On May 10, 1974 he received a suspended sentence on his guilty plea.[15] Five days later, on May 15, 1974, Rothstein was called as a defense witness. He then stated that much of his earlier trial testimony was false and that he had lied for the government when threatened that otherwise the prosecutor would use his influence to insure that he receive a five-year jail sentence. Rothstein claimed that he had told both the prosecutors and the FBI that he did not know Perry but that he had been forced to testify that he did know him.

The government's response to these allegations was an attempt to show that the recantation was motivated by Rothstein's fear for his own life. On cross-examination by the government Rothstein was asked if he had ever expressed fear for his own "personal safety to anybody during the course of this proceeding." He insisted that he

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15 Judge Judd sentenced Rothstein to a term of imprisonment of one year and one day but suspended execution of the sentence and placed Rothstein on probation for three years.

had not. To impeach this denial, Frederick Eder, Rothstein's probation officer, was permitted to testify that in January 1974, two months prior to trial, Rothstein had expressed to him fear for his personal safety. Further, the government was permitted to introduce a memorandum, which had been shown to the witness prior to trial, from Michael Pollack, the chief prosecutor in this case, to the Department of Justice. The memorandum, which was dated February 3, 1974, requested the termination of subsistence payments to Rothstein because he had left the area to which he had been relocated "and returned home, and [could] no longer be considered secure." Both the Eder testimony and the subsistence memorandum were admitted because they impeached Rothstein's denial of fear for his safety.[16]

Appellants argue that the admission of this "fear" testimony resolved the trial into a swearing contest in violation of *United States* v. *Cunningham*, 446 F.2d 194, 197 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971). In *Cunningham* a government witness did not give the testimony injurious to the government's case but he failed to remember certain events and conversations about which the government had expected him to testify. We held that under those circumstances it was improper to call a government agent to testify to conversations he had with the non-remembering witness since "[t]he maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised," and "where the witness gives no testimony injurious to the party calling him, but only fails to render

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16 Appellants contend that evidence of fear was irrelevant since any fear that may have existed could have been related to a prior loansharking case, a case which this jury was aware of. The existence of another possible cause of fear did not render the fear testimony inadmissible but merely affected its weight.

the assistance which was expected by professing to be without knowledge on the subject, there is no reason or basis for impeachment. . . ." *Kuhn* v. *United States*, 24 F.2d 910, 913 (9th Cir.), *modified on other grounds on rehearing*, 26 F.2d 463, *cert. denied sub nom. Lee* v. *United States*, 278 U.S. 605 (1928), cited with approval in both *United States* v. *Cunningham*, 446 F.2d 194, 197 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971) and *Taylor* v. *Baltimore & Ohio R.R.*, 344 F.2d 281, 284 (2d Cir.), *cert. denied*, 382 U.S. 831 (1965).

The witness Rothstein went far beyond asserting a failure of memory and directly accused the government of forcing him to commit perjury. Under these circumstances, "the Government could not be expected to remain silent in the face of a claim, vigorously developed by defense counsel . . . that it had procured false testimony by threats . . . ." *United States* v. *Rivera*, (No. 74-2115) (2d Cir. March 13, 1975) (slip op. 2263, at 2277). Further, "[i]t was competent for the Government not simply to deny that threats on its part had led to [Rothstein's direct] testimony but also to assert that it was his recantation rather than his [direct] testimony which was due to fear resulting from threats by unnamed third parties." *Id.* at 2278.

In addition to their *Cunningham* argument, the appellants contend that the testimony of Eder and the subsistence memorandum were improperly admitted because there was no evidence connecting any defendant to any threat to Rothstein's safety. No such connection need be shown.[17]

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17 The defendants may have been entitled to a limiting instruction that there was nothing in any of the evidence adduced to show that any of the defendants were responsible for any threats. No request for such an instruction was made either during Eder's testimony or at the time the subsistence memorandum was introduced. *United States* v. *Rivera*, *supra*, at 2278-79.

Rivera, *supra*, at 2278; *United States* v. *Franzese*, 392 F.2d 954, 961 (2d Cir. 1968), *vac. & rem'd on other grounds*, 394 U.S. 310 (1969).

VI. Prior Similar Acts

Yet another evidentiary ruling which the appellants claim requires reversal was the admission of prior similar acts, specifically testimony that in 1965 two of the driver co-defendants had fixed races. The rule in this Circuit as to prior criminal activity is in the inclusionary form and holds that evidence of other crimes is admissible except when offered solely to prove criminal character. *United States* v. *Keilly*, 445 F.2d 1285, 1288 (2d Cir.), *cert. denied*, 406 U.S. 962 (1971); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). In light of the defense contention that one or two drivers could not fix a race, the testimony that in the past one or two drivers had successfully fixed races was certainly probative. Therefore, when the testimony of these prior similar acts was offered not solely to show criminal character but to show that a race could be fixed by one or two drivers it was admissible with a proper limiting instruction. Such an instruction was given in this case.

Gerry relies on *United States* v. *Deaton, supra*, to argue that it was error to admit testimony that in 1966 his license as a harness race driver was suspended for one week by the New York State Harness Racing Commission for lack of financial responsibility. As discussed above, *Deaton* would mandate exclusion of this testimony only if it were offered solely to show bad or criminal character. The trial court admitted the license suspension testimony because it found that Gerry's financial responsibility had been put in issue by the defense contention that Gerry was "one of the greatest handicappers in the

world." While financial responsibility and handicapping skill are not necessarily interrelated, it can not be said that the suspension evidence was admitted solely to denigrate Gerry's character.

VII. *Prior Grand Jury Testimony of Witnesses*

A further evidentiary ruling to which Gerry takes exception permitted the introduction of the prior grand jury testimony of Marvin Proman and Joseph Pullman, both of whom testified at trial and both of whom recanted. Gerry concedes that the prior grand jury testimony of Proman and Pullman would be admissible under our holding in *United States* v. *DeSisto*, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), which indeed we adopted with the situation of recantation of grand jury testimony in particular view. He contends, however, that the prior grand jury testimony would not be admissible under Rule 801(d)(1) of the new Federal Rules of Evidence. This argument rests on a serious misreading of the new Rules which were signed by the President on January 2, 1975 and which become effective on the one hundred and eightieth day after enactment. Rule 801(d)(1) not only adopts but somewhat expands the *DeSisto* rule. The prior grand jury testimony was clearly admissible. See *United States* v. *Rivera*, *supra*, at 2274-75.

Gerry also objects to the admission of Proman's grand jury testimony on the ground that it contained impermissible hearsay statements made by Michael Sherman to Proman. In the grand jury Proman had testified that Sherman gave him money to bribe harness race drivers to finish "out of the money" and that Sherman had told him that the money came from Gerry. It is Gerry's position that for the Sherman statements to be admissible under the law in this Circuit it must first be shown by a

fair preponderance of the non-hearsay evidence that Sherman participated in the conspiracy. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Assuming solely for purposes of this argument that Gerry's contention is not an unwarranted extension of *Geaney*, we find that there was sufficient non-hearsay evidence to establish by a fair preponderance Sherman's participation in the conspiracy. There was non-hearsay testimony of Sherman's acts which is found in Proman's grand jury testimony; Cussell's testimony as to Perry's daily calls to Sherman; Lipkin's testimony that he saw Perry in Sherman's motel room; and the record of phone calls from Sherman's motel room to phones listed to Proman and Perry. There was no error in admitting Proman's grand jury testimony as to Sherman's declarations.

VIII. *Other Evidentiary Rulings*

Perry alleges that he was impermissibly prejudiced by a ruling of the trial court which allowed FBI Agent Sean Hilly to testify to a post-conspiracy admission Hilly overheard Gerry make to Kraft. Perry claims that in a joint trial the introduction of Gerry's admission violated his sixth amendment right to confrontation. *Bruton* v. *United States*, 391 U.S. 123 (1968). We find this contention to be without merit since the admission contained no reference to any other defendant and since the jury was properly instructed that the testimony was received only against Gerry. See *United States* v. *Trudo*, 449 F.2d 649, 651-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

Gerry and Perry assign as error the introduction of the testimony of the mathematician, Dr. Yaspan, and the numerous charts and graphs used to establish betting patterns. They claim that this evidence was not probative on

the question of bribery as it permitted the jury to convict them on the basis of probabilities, possibilities and mathematical speculation. See Tribe, *Trial by Mathematics,* 84 Harv. L. Rev. 1329 (1971). While there may have been an overkill in the mathematical, statistical, and graphic evidence introduced in this case, certainly sufficient evidence of actual bribery was adduced to refute the contention that the jury verdict was based on mathematical probabilities and not on actual evidence of bribery. In any event, this testimony was introduced for purposes of meeting defendants' argument that Gerry's apparent success was attributable to his handicapping skills and the judge gave appropriate cautionary instructions to remind the jury that Gerry's skills as a handicapper reflected his special knowledge of the field and not simply a mechanical application of a rule excluding horses bearing the longest odds.

IX. *Prosecutor's Conversations with Witness; The Pullman Tapes*

In addition to their claims of error relating to the sufficiency of the evidence and the various evidentiary rulings discussed above, appellants claim that the trial judge's handling of the problems arising out of a surreptitious taping of conversations held at the prosecutor's office was so prejudicial as to require reversal. Joseph Pullman, an indicted co-conspirator whose case had been severed prior to trial, had given testimony in the grand jury that was most damaging to Gerry and other defendants. After his grand jury testimony but prior to his being called at trial, Pullman, on April 16, 1974, met with Gerry's attorney and agreed surreptitiously to tape his interview sessions at the prosecutor's office. During the trial, on April 18, 19 and 21, 1974, Pullman went to the office of the Brooklyn Strike Force with a hidden taping device. While Pullman was

allegedly present at the Strike Force office to prepare for his forthcoming testimony, the tapes reveal that his real purpose in being there was deliberately to draw the prosecutors and government agents into making damaging statements. The fact that Pullman had taped his interview sessions was not immediately revealed, apparently because Pullman hoped to receive a grant of immunity before his taping activities were made known to the government. When Pullman was finally called at trial he denied the truth of his grand jury testimony and claimed that he had been coached in the grand jury by the prosecutor.

The tapes recorded by Pullman contain some unfortunate statements made by both the prosecutors and government agents. When, however, the defense arguments relating to the Pullman tapes are shorn of their rhetoric they resolve into the following contentions: (1) that the government suborned perjury on the part of the witness Kraft and then lied to the court about this alleged subornation; (2) that the court below erred in not ordering Kraft recalled as part of the government case; (3) that the court below erred in requiring the preparation of a transcript of the tapes as a prerequisite to their being played; (4) that statements on the tapes called into question the integrity of the trial judge and he should have declared a mistrial; and, (5) that the court's statements concerning the legality of the taping prejudiced Gerry.

On Friday, April 19, 1974, a day on which Pullman wore a recording device in the prosecutor's office, David Kraft had been cross-examined by the defense attorneys and was expected to resume his testimony on the following Monday. As discussed above in relation to his testimony concerning a "fierce mob," Kraft had been asked whether he believed that he was the victim of a "tout" scheme. That evening at the Strike Force office Kraft discussed his testimony

with government agents. At one point in this discussion FBI Agent Fanning asked: "All right, do you think he was touting Richard Perry? and the Vario's? Do you think he was touting the Vario People." Based on this question the appellants argue that the government was suborning Kraft to commit perjury. We find that a reading of the transcripts fails to support this charge. Indeed, the question asked by Fanning, when viewed in the context of the entire conversation, appears to have been nothing more than an honest attempt to discover why Kraft didn't believe that there was a "tout" scheme.

We also find no merit in the allegation that the prosecutor, Michael Pollack, deliberately lied to the court as to the date on which he discussed with Kraft possible avenues of rehabilitation. Pollack admitted that he had spoken to Kraft on Friday, April 19, 1974, but that the meeting was chaotic and he did not receive a satisfactory response until Monday, April 22, 1974. Pollack volunteered that "for me, Friday through Monday is one day." While the tapes show a more extended Friday conversation between Pollack and Kraft than Pollack's statements may have led one to expect, Pollack was correct in stating that there were many other people milling about and that the meeting was rather chaotic. Further, there is no reason for Pollack to have misled the court as to whether he spoke to Kraft on Friday or Monday as it was clearly a collateral issue of no significance.

The appellants' second argument arising out of the Pullman tapes is that after the existence of the tapes was made known the court erred in not ordering Kraft recalled as part of the government case so that he could be subjected to further examination based on the tapes. The decision as to when a witness is to be recalled rests in the sound discretion of the trial court. *United States ex. rel.*

Nelson v. *Follette*, 430 F.2d 1055, 1059 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). While it might have been wiser to permit Kraft to be recalled, we find no abuse of that discretion in this matter. The defense attorneys obtained possession of the Pullman tapes while Kraft was still testifying as a government witness. Their decision not immediately to divulge the existence of the tapes and then use them in examining Kraft was a tactical decision. In any event, as the court pointed out, defendants had the opportunity to call Kraft during the presentation of their cases.

The appellants also argue that the trial judge could not condition the playing of the tapes on the preparation of an accurate transcript. This was a decision which rested in the sound discretion of the trial court and, again, we can not say that there was an abuse of that discretion. The judge's insistence on the preparation of a transcript, based in part on his difficulty in understanding the tapes, was both clearly and consistently made known to the defense counsel. The judge himself provided counsel with a rough transcript of all the tapes. Thus he did more than he was required to do. See *United States* v. *Frazier*, 479 F.2d 983 (2d Cir. 1973).

It is contended by Gerry and Perry that statements contained on the tapes called into question the integrity of the trial judge and he was obligated *sua sponte* to declare a mistrial. Statements made by both the prosecutor and government agents relating to the prosecutor's influence over the trial judge in the matter of sentencing were both deplorable and unprofessional. It was indeed indiscreet for the prosecutor to inform Pullman that the trial judge had supported him in obtaining admission to the bar. However, a full reading of the transcripts shows that Pullman was pressing further and further to elicit damaging state-

ments and that although the prosecutor claimed to have some influence with the judge, he did make it clear that no assurances could be given as to what the judge would ultimately do on sentencing. In any event there was no obligation on the part of the trial judge to declare a mistrial or dismiss the indictment.

The appellants' last contention arising out of the Pullman tapes is that the trial court's statements concerning the legality of the making of the tapes unduly prejudiced Gerry. After the existence of the tapes was made known to the jury, the defense requested an instruction that there was "nothing illegal or wrong or criminal" in Pullman's making the tapes. The judge did not give the requested instruction and stated in the presence of the jury: "I'm not sure about that." He added: "Well, by saying I am not sure, doesn't mean it's wrong. It means I am not sure it is right." The next morning the judge formally instructed the jury that there was no law that prevented the making of the tapes and that the propriety of their having been made had no relationship to the guilt or innocence of any of the defendants. There was no prejudice to the defendant Gerry in these instructions.

X. *Prosecutor's Summation*

Appellants' final claim of error relates to the propriety of both the prosecutor's summation and the court's charge. In particular, Gerry objects to the prosecutor's discussion of Proman's disappearance prior to trial and the speculation that he was being supported by Gerry during this period. We find that these comments did not transgress the "broad limits" within which "counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence." *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968).

Appendix A

XI. *Charge of the Court*

The charge delivered to the jury was a fair and full statement of the law and gave proper guidance to the jury. The judge would have been better advised to omit certain statements, particularly a comment on his interest in why Pullman insisted on receiving a grant of immunity rather than pleading guilty and "tak[ing] his chances on the sentence I might impose." While this and other statements in the charge were unnecessary and unfortunate, we do not believe that they resulted in any prejudice to the appellants. Cf. *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974).

We have considered the other claims of the appellants and find them to be without merit.

The judgments of conviction are affirmed.